No. 708

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

November Term, 1968

CHARLES H. COX,
2010 East 49th Street, Kansas City, Missouri,

J. L. COX,
1507 East 40th Street, Kansas City, Missouri, and

CLAUDE G. COX,
33 West 77th Street, Kansas City, Missouri,
Plaintiffs-Appellants,

VS.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

On Appeal From the United States District Court
For the Western District of Missouri
Western Division.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO

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JURISDICTIONAL STATEMENT.

Charles H. Cox, J. L. Cox and Claude G. Cox having appealed from a Memorandum and Order of a three-judge District Court for the Western District of Missouri

sustaining a motion for summary judgment in favor of defendant and party defendant and against the appellants, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below.

The Memorandum and Order of the three-judge District Court for the Western District of Missouri, Western Division, Civil Case No. 14143, is appended hereto, *infra,* at pp. 1a-14a.

The appellants' copy of the Negative Order of the Interstate Commerce Commission was placed in the records of the United States District Court and should be available in the records transmitted from the District Court to the High Court.

Jurisdiction.

The three appellants were truckers by occupation and business, hauling merchandise and material in interstate commerce. These three appellants each have an eighth grade education. Two of these appellants filed under Section 206(a) and/or Section 208(a) of Public Law No. 255 cited Motor Carrier Act of 1935, 49 USCA 301 to 327 inclusive to continue work in their life's occupation, business, profession and calling.

Again, all three appellants filed for permits to continue their occupations, businesses, professions and callings under Public Law 85-625 cited Transportation Act of 1958, Section 7, paragraph (c). Interstate Commerce Commission hearings were held October 2, 1959, December 8th, and December 9th, 1960. A Negative Order was issued, service date July 3, 1961. Appellants appealed same to an Honorable three-judge United States District

Court. Said Court issued Memorandum and Order July 15, 1968, granting the motion for summary judgment and affirming the decisions of the Interstate Commerce Commission.

We are appealing according to U.S.C.A. Title 28, Section 1253, note 9, "Grounds for Appeal," which states that cases arising out of Interstate Commerce Commission proceedings, and having been reviewed by a three-judge U. S. District Court have direct appeal to the Supreme Court of the United States. We are appealing in its entirety the Memorandum and Order of the three-judge U. S. District Court filed July 15, 1968, appended thereto, and are continuing to seek to enjoin enforcement and execution of an Act of Congress, that Act being Public Law No. 255 cited Motor Carrier Act of 1935 49 USC 301 through 327 and the amendments thereto being Public Law No. 85-625 cited Transportation Act of 1958, Section 7 and Section 8, 49 USC 301 and 310, appellants timely filed Notice of Appeal, and Request for Certification and Transmission of Records from U. S. District Court to U. S. Supreme Court and served copies of some to appellees' attorney of record.

The Constitutional questions raised herein were raised in the Interstate Commerce Commission hearings, and the transcript of the hearings (contained in the records transmitted from the District Court to the High Court) will hear this out. We furnished those transcripts to the District Court, and they are the only copy we have ever had of them. We also raised these Constitutional questions to the three-judge United States District Court.

Statutes Involved.

Public Law No. 255, Section 203 (a), 49 USC 303

> "(5) The term 'certificate' means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle.
> "(6) The term 'permit' means a permit issued under this part to contract carriers by motor vehicle.
> "(7) The term 'license' means a license issued under this part to a broker.
> "(12) The term 'highway' means the roads, highways, streets, and ways in any State."

Public Law No. 255, Section 204 (a)(6), 49 USC 304

> "(6) To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration."

Public Law No. 255, Section 206 (a), 49 USC 306 (a)(1)

> "No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations:
> *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which

the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect."

Public Law No. 255, Section 208 (a), 49 USC 308 (a)

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate."

Public Law No. 255, Section 209 (a) 49 USC 309 (a)(1)

"No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided,* That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions

of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission, as provided in paragraph (b) of the section and within one hundred and twenty days after this section shall take effect."

Public Law No. 255, Section 213, according to 49 USC 313 a footnote there tells us that Section 213 was operative until repealed sometime in the 1950's, but is quoted here in the statutes involved by the appellants to show the working value or nature of related sections:

"(a) It shall be lawful, under the conditions specified below, but under no other conditions, for two or more motor carriers which are not also carriers by railroad to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and/or operation of the properties theretofore in separate ownership; or for any such motor carrier or two or more such carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person which is not a motor carrier or a carrier by railroad, or express, or water to acquire control of two or more motor carriers through ownership of their stock; or for any such person which has control of, one or more motor carriers to acquire control of another such carrier through ownership of its stock; or for a carrier by railroad, express, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof."

"(b)(3) For the purposes of this section, wherever reference is made to control, it is immaterial whether such control is direct or indirect."

"(c) The district courts of the United States shall have jurisdiction upon the application of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order."

"(e) Except where a carrier other than a motor carrier is an applicant or any person which is controlled by such a carrier or carriers by railroad or affiliated therewith within the meaning of section 5 (8) of part I, the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty."

"(f) The carriers and any person affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the 'antitrust laws', as designated in section I of the Act entitled 'An Act to supplement existing laws against unlawful restraints, and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order."

Public Law No. 255, Section 222 (a), 49 USC 322

"(a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for

which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense."

Public Law No. 255, Section 227 (a), 49 USC 327

"(a) This part (except this section, which shall become effective immediately upon approval) shall take effect and be in force on and after the 1st day of October 1935: *Provided, however,* That the Commission shall, if found by it necessary or desirable in the public interest, by general or special order, postpone the taking effect of any provision of this part to such time after the 1st day of October 1935, as the Commission shall prescribe, but not beyond the 1st day of April 1936."

"Approved, August 9, 1935."

Public Law No. 85-625 cited Transportation Act of 1958 49 USC 310, "Amendment to Section 203 (B) of Interstate Commerce Act, Section 7

"(c) Subject to the provisions of section 210 of the Interstate Commerce Act, if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions or part II of that Act by paragraph (a) of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further

proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect." Unquote.

Public Law No. 85-625, Section 8, 49 USC 303

"Approved August 12, 1958." Unquote.

Questions Presented.

(1) Were appellants entitled to a trial by jury during the original hearing of this case as provided for in the Constitution of the United States?

(2) Did appellees, under Public Law No. 255, cited Motor Carrier Act of 1935, 49 USC 310 Section 208 (a), and Section 209 (a) approved in Section 227 (a) on August 9, 1935, to become effective October 1, 1935, (with possible postponement provision until April 1, 1936) and Public Law No. 85-625 cited Transportation Act of 1958 amendment to Section 203 of Interstate Commerce Act, Section 7, paragraphs B and C, 49 USC 310 approved August 12, 1958, pass and enforce an *ex post facto* law against these appellants in violation of the Constitution of the United States, Article One, Section IX, paragraph 3, and we quote: "No bill of attainder or *ex post facto* law shall be passed."? Unquote.

(3) Should the appellants have been held to be plaintiffs or defendants in the Interstate Commerce Commission hearings?

(4) Does Section 206, Section 208, Section 209, Section 213 (a), Section 213 (e), Section 213 (f), Section 222 (a) of Public Law No. 255, 49 USC 301-327, grant the same privileges and immunities to the rich and poor, Negro and white, young and old, these appellants and future pos-

terity in accordance with Article 4, Section 2, of the Constitution of the United States, and Article 14, Section 1, of the Amendments to the Constitution of the United States?

(5) In the Interstate Commerce Commission hearings, did the hearing Examiner suppress evidence?

STATEMENT OF THE CASE.

These appellants, Charles H. Cox, J. L. Cox and Claude G. Cox, are appealing to the United States Supreme Court without the aid of legal counsel. This case originated from filings made by appellant Charles H. Cox and appellant Claude G. Cox filed to retain their rights to continue trucking under the Grandfather Rights Section of Public Law No. 255 cited Motor Carrier Act of 1935, 49 USC 306 and 308. Claude G. Cox was issued certificate and/or permit No. MC 61924, and Charles H. Cox was issued MC 51121. To the knowledge of these appellants, no formal Interstate Commerce Commission hearings were held on these permits, and appellants were never able to find out through the years what had happened or was happening on them.

About twenty-two years later, Public Law No. 85-625 cited Motor Carrier Act of 1958, 49 USC 310 was passed. All three appellants, Charles H. Cox, J. L. Cox, and Claude G. Cox, separately filed for permits to retain their rights to continue in certain trucking operations. Again, Claude G. Cox and Charles H. Cox plus J. L. Cox filed under Public Law No. 85-625, paragraph 7 (e), 49 USC 301-307, cited Transportation Act of 1958. This time, Claude G. Cox got back his old permit number 61924 with sub 1 added, the number being 61924 sub 1. J. L. Cox filed under 49 USC 301-310, the same Transportation Act of 1958 and received a number.

Interstate Commerce Commission hearings were held for Charles H. Cox on October 2, 1959, and on suggestion of counsel for competitive truck lines and railroads that were present, the Interstate Commerce Commission continued hearings on Charles H. Cox to December 8, 1960,

and included J. L. Cox and Claude G. Cox in these same hearings. These hearings were held December 8, 1960, and December 9, 1960. The appellants entered into the record a list of constitutional questions. In the hearings the appellants served a subpoena on the Examiner, for the records pertaining to the old permits. The Examiner refused same, and subsequently, a negative order was issued by the Interstate Commerce Commission, Service Date July 3, 1961. The old permits filed for under the Motor Carrier Act of 1935 were discussed in the hearing. The Examiner in his report and recommended order, ruled on these old permits by stating, and we quote: "These applicants hold no authority from this Commission." Unquote. Our copy of this report and recommended order is contained in the records of the District Court which has been transmitted to the High Court. This negative order, in fact, excluded these three appellants from trucking for hire for life. During the hearing, these appellants did request a jury trial, but were refused same. Furthermore, these appellants were made to be plaintiffs and were made to carry the burden of proof, when in truth and fact they were actually defendants attempting to defend their right to work in their chosen lifetime occupation—trucking. Further, these appellants were held accountable for what did or did not happen, what these appellants could or could not prove, for the papers these appellants had kept or had not kept covering a period of time prior to the date of enactment of the above-cited public laws. To these appellants, it appeared in fact that an *ex post facto* law had been passed and enforced against us. For these reasons, as well as other specific constitutional questions, these appellants did appeal to an Honorable three-judge United States District Court for the Western District of Missouri. The Honorable Judge Smith originally received this case and we believe

had a very active interest in it. Unfortunately for all, Judge Smith passed away with a heart attack. Then, as the record will show, other Honorable Judges were subsequently assigned. The case was originally No. 13545-1, and the Honorable Judge John Oliver having received the case from Judge Smith, dismissed it out of court without prejudice because the pleadings were too long, and suggested for our own good that we retain legal counsel. His advice was well taken by these appellants, and he granted us time to find same. However, legal counsel just wasn't available for this case. Large law firms that deal in this type of case are mostly retained by competitors or would have a conflict of interest, and the good general practice lawyers just don't understand this Interstate Commerce Commission stuff, and find it difficult to believe what has really happened out here. As one large law firm told us, if they took the case, it was so big they would have to get all the rest of the cases out of their office and have a retainer the size of a year's income in order to handle it. We can understand lawyers have to pay office overhead and these appellants had a limited amount of money. These appellants reported our problem to the Honorable Judge John Oliver and he was sympathetic to our situation and allowed us to file back into court doing the only thing we could do and that was to proceed without legal counsel. These appellants filed 217 interrogatory questions for the Interstate Commerce Commission to answer. The Interstate Commerce Commission refused to answer these questions. The Court took the motion under advisement. The case lay dormant until the Honorable Judge John Oliver called a pre-trial conference. These appellants represented ourselves. The United States of America and the Interstate Commerce Commission were represented by Mr. Calvin K. Hamilton, then assistant U. S. District Attorney and now United

States District Attorney. These appellants agreed to withdraw their interrogatory questions on the premise Judge John Oliver would order the Interstate Commerce Commission to produce records pertaining to these appellants. Some records were produced. A stipulation was signed. The case was tried on a series of written briefs. The Interstate Commerce Commission and the United States of America filed a motion for summary judgment. There was disagreement as to whether cases presented pertained to this proceeding; however, the Court ruled on July 15, 1968, a Memorandum and Order was issued upholding the party defendant and against these appellants.

These appellants are appealing the above Memorandum and Order on a variety of questions as to the constitutionality of the Acts of Congress, 49 USC 301 through 327 inclusive, and the constitutionality of the Interstate Commerce Commission hearings to which these appellants were subjected. These appellants did present these direct constitutional questions to the Honorable three-judge District Court, but as the appellants see it, the Honorable three-judge District Court failed to meet any of these constitutional questions head-on and give them a direct answer or decision. Instead the Honorable Court went along with a motion for summary judgment filed by the party defendant. This motion for summary judgment cited many cases, none of which in the appellants' opinion actually pertained to the constitutional questions at the bar. These decisions were arrived at, as these appellants see it, in entirely different situations, entirely different presentations, and in cases where corporations were litigants and possibly the High Court didn't have to be careful of the corporations' constitutional rights because it may be that the corporations didn't have any constitutional rights, and in some cases the corporations were

merely trying to extend their authority to operate and weren't being wiped out entirely as these individuals were. For these reasons and many more, the appellants don't feel that these cases satisfy the constitutional issues involved in this action.

These appellants filed a notice of appeal and served all parties concerned on September 13, 1968. These appellants did file requests to certify and provide for transmission of all records pertaining to this case to the Supreme Court of the United States on September 13, 1968.

The Questions Are Substantial.

Pertaining to question one, under Public Law No. 255, Part 2, Section 203 (a), 49 USC 303, and we quote: "(5) The term 'certificate' means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle.

(6) The term 'permit' means a permit issued under this part to contract carriers by motor vehicle." These certificates and/or permits are issued under Section 206 (a) and Section 209 (a) of Public Law No. 255, 49 USCA 306 and 309 and Section 7 (c) of Public Law No. 85-625, 49 USCA 310. The provisions for selling or purchase or consolidation or merger of these certificates and/or permits was contained in Public Law No. 255, Sections 213 (a) and 213 (e), this section amended with 49 USC 313 (a). Now, as we see it, if the law provides for the sale of these permits and/or certificates, and of our personal knowledge we know these permits have been sold for hundreds of thousands of dollars, we contend said certificates and permits are *property*. If the permits and/or certificates are property, and worth, in most instances, far in excess of fifty thousand dollars ($50,000.00), then these appellants believe they were

entitled to a trial by jury as provided for in Article VII of the Amendments to the Constitution of the United States. The appellants made numerous requests for trial by jury. In the Interstate Commerce Commission hearing transcript, page 162, line 25 through page 163, line 20, and page 203, line 1 through line 10, bears evidence of this fact and also that examiner refused same. In the hearing transcript on page 242, line 22, through page 243, line 21, the hearing examiner states that appellants had Interstate Commerce Commission right to haul for hire on December 8, 1960. The rights were taken away from the appellants in a negative order issued service date July 3, 1961.

A fairly comprised question contained in this question involves whether the Interstate Commerce Commission hearing was *settling property ownership* or was the Interstate Commerce Commission considering *technical problems* in transportation. Now as set out is USCA Title 49, Section 17, paragraph 13, and we quote: *"Questions Considered*: Matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked, and, even when resort to court can be had to review the Commission's order, only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised."

"Judicial review of Interstate Commerce Commission's motion is not foreclosed as respects question of whether it may have exceeded its statutory or constitutional authority in entering a particular order." Unquote. The Interstate Commerce Commission hearing in this case was not considering tariffs or rates, it was not considering lengths, widths, or heights or weight of trucks, nor was it considering safety equipment, such as flags, flares, reflector flares, fuzees, positioning and number of rear

clearance lights, side clearance lights, front clearance lights, spare bulbs, features, C.O.D. charges, or anything of that technical nature. *It was pure and simple a case of who owned property,* namely, certificates and/or permits. This property could be sold and if less than twenty (20) trucks were involved in the sale, under Section 213 (e) the sale didn't even require the approval of the Interstate Commerce Commission. *As we see it, if we were merely settling property rights,* we belonged not in Interstate Commerce Commission hearings on the first instance of hearing of the case, but instead in United States District Court where juries were available.

This case is not the usual case involving corporations which have no constitutional rights. These appellants are citizens with full guarantees of their constitutional rights. In the case of *RE Rainbow Express Inc.,* 15 ALR 2d 876, the Court held these certificates and/or permits to be *property,* even capable of becoming subject matter of a valid chattel mortgage. In the case of a corporation, possibly, the Interstate Commerce Commission could handle their property any way they wanted to, because corporations do not have constitutional rights, but in the case of these individual citizens, the appellants, Article VII of the Amendments to the Constitution of the United States, and we quote: "In suits at common law, where the value of controvery shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ." Unquote. This is one of our constitutional guarantees. In the case of *RE Rainbow Express Inc.,* 15 ALR 2d 876, the Court takes notice in the written opinion and we quote:

> "It is called to our attention that the trustee sold the operating rights evidenced by the certificate in question for a sizeable sum and then joined the pur-

chaser in obtaining the approval of such sale by the commission. This serves to emphasize the fallacious position of the trustee, formerly embraced by this Court that the certificate represented no proprietary right.

The previous opinion in this matter rendered March 17, 1949 is withdrawn, and all orders entered pursuant thereto are vacated and set aside. The order appealed from is affirmed."

Rehearing denied February 10, 1950

Petition for writ of certiorari denied by the Supreme Court of the United States June 5, 1950—339 US 981

In addition to the property, there was at stake the business, occupation, profession and calling of these three appellants as well as infinitely precious human rights, and monetary losses due to the fear of shippers to ship loads with the appellants because the Interstate Commerce Commission would not admit appellants were in legal operation, and said Commission would write threatening letters to shippers telling them that the shippers could be fined large amounts for shipping with illegal operators. As is shown in the volumes of exhibits, sent up from the lower Court. As early as 1936, these appellants had the best of customers. For example, we had Cudahy Packing Company; Swift and Company; Wilson and Company; Libbey, McNeil, and Libbey; and others. We estimate our monetary and property losses at fifty million dollars ($50,000,000.00) due to the adverse actions of the Interstate Commerce Commission. We are setting this figure out merely to meet the jurisdictional requirement of 28 USC 1331 that the "matter in controversy" exceeds the value of $10,000.00.

This case again differs in the fact that Public Law No. 255, Section 222 (a), 49 USC 322, provides for five

hundred dollars ($500.00) a day fines for anyone violating this law or the orders, rules and regulations of the Commission. Since a year of these fines would constitute over one hundred and eighty two thousand dollars ($182,000.00), a man would end up in the federal penitentiary. So, therefore, we see this Act is criminal in nature. We cite *Ex parte Young,* 209 US 123, which holds that a person need not risk severe criminal penalties in order to assert his constitutional claims. This brings to mind our constitutional guarantees in Article VI of the Amendments to the Constitution of the United States and we quote: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him"; unquote. We received none of these.

Another fairly comprised question is which judiciary body of first instance of hearing should have tried this case, the Interstate Commerce Commission or the United States District Court for the Western District of Missouri? We respectfully submit the Honorable United States Supreme Court has probably jurisdiction to review.

As pertaining to question number two, the Public Law No. 255, cited as the Motor Carrier Act 1935, 49 USC 301 through 327, was passed on August 9, 1935. In the Act, there was a Grandfather Clause found in Section 209 (a) line 7, and we quote: ". . . if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935 . . ." Unquote. In the case of common car-

riers, we find the Grandfather Clause in Section 206 (a) line 7, and we quote: ". . . if any such carrier of predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 . . ." Unquote.

In the Transportation Act of 1958, "amendment to Section 203 (b) Interstate Commerce Act," Public Law No. 85-625, 49 USC 301-310, Section 7, paragraph b and c contained Grandfather Rights provisions and the cutoff date was May 1, 1958. However, this Act being Public Law 85-625, 49 USC 301-310 was enacted by the Eighty-Fifth Congress on August 12, 1958.

In the hearings, the appellants were held accountable for what they had done or had not done, could prove or could not prove, and for the papers which constituted evidence which they had kept or had not kept, for a period of time before the law was approved or effective. Now, prior to August 9, 1935, there was no law that required a man to keep papers on any of the hauling he had done, or if he did keep papers, any particular form, fashion, or type they had to be or any arrangement; and in 1958 the commodities concern was exempt from party defendant regulations, so again there was no law concerning the type of papers you had to keep. As to the evidence of how appellants were held accountable for the type, form and fashion of these old papers which we weren't required to keep before the law was passed, we refer the High Court to the Interstate Commerce Commission hearing transcripts, page 221, line 14 through page 231, line 18, and the record will speak for itself. The copies of the hearing transcripts were forwarded from the District Court to the High Court with the records of this case. These old papers prior to the time the law was passed were the all-important factor.

The decision of the Interstate Commerce Commission and the sentence of the Interstate Commerce Commission whereby appellants were excluded from Interstate Commerce for life is actually based on the fact that we failed to preserve papers in the style and manner and form that meets the fancy of the party appellee in the present day.

The appellants were held accountable for the time prior to June 1, 1935, on Claude G. Cox's permits, and prior to July 1, 1935, on Charles H. Cox's old permit, under an act that was not passed by the Congress until August 9, 1935. In the cases of all three appellants under the Motor Carrier Act of 1958, they were held accountable for a period prior to May 1, 1958, and the act was not passed until August 12, 1958.

Another question fairly comprised in question number two is, did the Interstate Commerce Commission hearing enforce an *ex post facto* law against the appellants? We respectfully submit to the High Court that an *ex post facto* law has been passed and enforced against the appellants, and the High Court does have probable jurisdiction to review it. As to cases in point, we do not believe this question has ever been presented before the High Court by an individual citizen asserting his constitutional rights.

In reference to question number three, in Public Law No. 255, 49 USC 301 through 327, Section 206 (a) and Section 209 (a), 49 USC 306-309, it states the Commission shall issue such permit, if application is made to the Commission, within one hundred and twenty (120) days from the time the law becomes effective, and Section 227 (a) states the law was approved on August 9, 1935, but could become effective any time between October 1, 1935 and April 1, 1936. Public Law No. 85-625, 49 USC

310, Section 7 (e), states that application made within one-hundred and twenty days (120) after the Act takes effect. It was approved August 12, 1958. These appellants answered the Congress of the United States with said applications to defend their right to continue work of trucking for hire in Interstate Commerce, and as a defense against Public Law No. 255, Section 222, 49 USC 322, that states the appellant would be fined five hundred dollars ($500.000) per day if appellants continued their trucking operations without filing this instrument called an application which in truth and fact is an answer to a proceeding started by the Congress of the United States against the appellants in the form of Public Law No. 255, 49 USC 301 through 327. At the Interstate Commerce Commission hearings, the appellants appeared to further defend their rights, and signed in their respective appearance slips as stated by Examiner Laughlin in his report and order that their interest in these proceedings were that of defendants. Now, during the course of the Interstate Commerce Commission hearings, the group known as protestants, when it came their turn, admitted they had nothing to offer for the record against these appellants, and the Examiner had nothing on the part of the United States of America to offer against these appellants, but with no adverse evidence against the appellants, the Interstate Commerce Commission decided that these appellants had failed to prove up, and this was upheld by the United States District Court. Hence, the questions—Did these appellants have to prove anything? Should these appellants have had to carry the burden of proof? Or were these appellants merely defendants? It should be remembered that the appellants did not make the first attack on the appellees. The Congress of the United States made the first attack on the appellants

in the above cited portions of the law, and the appellants merely made a defensive answer to that attack, in the form of an application. This brings to mind our guarantee in Article VI of the Amendments to the Constitution of the United States guarantees a speedy and public trial by an impartial jury and to be informed of the nature and cause of accusations and to be confronted with witnesses against him, and compulsory process of obtaining witnesses in his favor. We had none of these. Naturally, you might say this wasn't a criminal hearing, but in Public Law No. 255, Section 213 (c), violation or disobedience to the Act goes to the jurisdiction of the United States District Court and Section 222 (a), 49 USC 322, provides for five hundred dollars ($500.00) per day fines. So, we believe the action is criminal in nature as well as civil in deciding the question of who should have been the defendant, and who should have been the plaintiff. A basis for this train of thought would be *Ex Parte Young,* 209 US 123, which holds that a person need not risk severe criminal penalties in order to assert his constitutional claims. We respectfully submit that the Honorable United States Supreme Court has probable jurisdiction to review.

Pertaining to question number four, Public Law No. 255, 49 USC 301 through 327, Section 205(a), 49 USC 306, Section 208 (a), 49 USC 308, and Section 213 amended, 49 USC 313A and Public Law 85-625, 301-310, Section 7 (c), 49 USC 301-310, granted these permits with Grandfather Rights provisions. These permits were issued to the prosperous, upper-middle class who had a trucking operation going. The poor white people who hadn't saved enough money to buy a truck yet, couldn't apply for a permit. The Negroes, as a group, were extremely poor, and not one Negro in the United States of America was

issued a common carrier general commodity certificate. The appellants, Charles H. Cox and Claude G. Cox, were not issued permits or certificates. Under Public Law No. 255, J. L. Cox was too young to apply for a certificate or permit, but of course appellant J. L. Cox was old enough to be a Sergeant in Motor Transportation on truck convoys hauling into front lines in Germany in World War II and did. Now, the only place J. L. Cox could apply was under Public Law No. 85-625 in 1958, along with the other appellants. This also was refused. Future posterity is refused these permits. And now we see that Section 213 (a) and 213 (e) these sections were amended with 49 USC 213A, provide for wealthy people buying up these permits and Section 213 (f) protects the wealthy people from any prosecution under the antitrust laws. The poor, the Negroes, the young, the old, the other people who own trucks do not have any protection from antitrust laws. We find that Section 204 (a) (6) gives the Commission the right to administer, execute, enforce, make orders, prescribe rules, regulations, procedures, and Section 213 (e) gives the United States District Court jurisdiction over any poor people who violate orders, rules, etc. heretofore mentioned, and Section 222 (a), 49 USC 322, provides for five hundred dollars ($500.00) a day fine for a man who takes his truck and merely goes out to work and haul for money to feed his family. He may be a Negro, he may be a poor white man, he may be a man too young to file under the Act, he may be an old man who has no other way of making a living, he may be so old he has to hire a driver and send the driver out with the truck, or he might even be one of our long-haired kids, the posterity of our nation, who has been shut out of the main stream of life by this law. These permits and certificates today are

owned by wealthy Caucasian people. Now we want to refer you to Section 208 (a), 49 USC 308, paragraph 1, line 7 and 8 and we quote ". . . be attached to and exercise of the *privileges* granted by the certificate . . ." Unquote. So with this, the law admits these are privileges. Now the wealthy people who own these certificates or permits enjoy immunity from being arrested and put in jail and fined under 49 USC 322 for hauling for hire in interstate commerce. If the wealthy people can enjoy the privileges of hauling for hire and immunity from arrest for having done it, then we respectfully submit that all the people have a right to haul for hire and immunity from arrest as guaranteed in Article 4, Section 2, paragraph one of the Constitution of the United States of America and we quote: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states." Unquote. Article 14, Section 1 of the Amendments to the Constitution of the United States and we quote:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We cite *Ex Parte Young,* 209 US 123, which holds that a person need not risk severe criminal penalties in order to assert his constitutional claims. Another fairly comprised question in question four is: Has the Congress of the United States exceeded their authority vested in them by the Constitution of the United States, Article 1,

Section 8, paragraph 3 (and we quote: "To regulate commerce with foreign nations and among the several states, and with the Indian tribes"; unquote.) To regulate commerce between the states and entered into fields of restricting the majority of citizens from interstate commerce on one hand and reserving the commerce for a favored few financially wealthy people on the other hand in violation of Article 9, Article 10, amendments to the Constitution of the United States? Article 9 states and we quote: "The enunteration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Unquote; and Article 10 states and we quote:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

Another fairly comprised question contained herein is: Prior to 1935, when there were no laws pertaining to hauling for hire over the public highways, the city streets, the county roads, the state highways and the federal highways, in whom was the right to haul for hire vested? The Congress of the United States, or the people of the United States who built and paid for those roads for their own use? Now in Public Law No. 255, 49 USC 303 (a), 12 and we quote: "(12) The term 'highway' means the roads, highways, streets, and ways in any State." Now looking at Articles 9 and 10 heretofore quoted, we see that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people. The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people.

We cannot find anywhere in the Constitution of the United States where the power, privilege and right to haul for hire over public highways, county roads and city streets, etc. was given to the Congress of the United States. We know that the father of these appellants had the *power*, the *privilege*, and the *right* to haul for hire with teams of horses and wagons as early as 1903 over these public roads, and bought his first trucks in 1925. Some of these appellants hauled with trucks as early as 1929. We believe under Article 9 and Article 10 as quoted, these powers, rights and privileges are retained to the people of the United States and were never given to the Congress of the United States. How could the Congress of the United States give to a private businessman in the form of a certificate that is property, (and these certificates were held to be property in the case of *RE Rainbow Express, Inc.*, 15 ALR 2d 876) the power, right and privilege to haul for hire over public highways, county roads and city streets and allow that private businessman to sell said certificate to another private businessman for, in many cases, several hundred thousand dollars when none of these businessmen had never bought and paid for the public highways, county roads, and city streets. These are still the property of the people of the United States, and if Congress didn't have the rights, powers and privileges to haul for hire over public roads in the first place, from what source did they acquire the right?

Another question fairly comprised herein is: Do these common carrier and contract carrier permits and/or certificates issued under 49 USC 301 to 327 inclusive, constitute a title of nobility granted by the United States? We are referring to Article 1, Section 9, paragraph 8 (line 290) in the Constitution of the United States and

we quote, "No title of nobility shall be granted by the United States"; unquote. In considering 49 USC 301 through 327, we see that common carrier certificates and contract carrier permits were issued under 49 USC 306, 49 USC 309, 49 USC 310, and we see that in 49 USC 308 (a), they contained a fixed territory or realm as an English lord or earl or duke might have had. We see that these permits and/or certificates came from a sovereign government, such as the royal throne of King George. The original Section 213 of the Act amended about sixteen years later by 49 USC 313A, made it possible for the holder of these titles of Common Carrier and Contract Carrier to name their successors, passing it on to their heirs or selling it. We found in the original Section 213 (f) of Public Law No. 255, these titled common carriers and contract carriers enjoyed immunity from antitrust laws, a royal privilege which no other ordinary businessman has. We see in Public Law No. 255, Section 213 (c), where these titled common and contract carriers could protect their realm or territory against any citizen infringing upon it by merely reporting to the Interstate Commerce Commission such infringements and the Interstate Commerce Commission could apply to the District Courts and this little citizen, in 49 USC 322, would see a fine of five hundred dollars ($500.00) per day staring him in the face, and of course, if a group of truckers were to defy the order of the court, the U. S. Army would be called out, all to protect the realm or territory of one of these contract carriers or common carriers. We're sure that King George would have called out his army too, to protect the realm of any of his lords, dukes or earls, if their authority was threatened. Now, in England, if we understand it correctly, in the days of royalty, the people paid a tribute or per cent on the

business done in the realm of a lord, duke or earl. In the case of the contract carriers and common carriers in this country, when these certificates and/or permits were issued, the holders of these permits had, possibly, 1 truck or 2 trucks, but by the size of their operation, we will say virtually, no trucks. What really happened, the little private citizens with trucks would pick up the loads, haul them, and deliver them, and give up a fourth, third or half of the revenue to the titled Common Carrier or Contract Carrier, merely for allowing the citizen to put the Carrier's name and certificate number on the side of the truck. All the Common Carrier or Contract Carrier furnished in many instances, was insurance. It was bought on a blanket policy with description of equipment waived and paid for on a gross receipts basis of about three per cent when this law went into effect and ranges to about five per cent today. A classic example of this was when the steel haulers strike headlined in our papers about a year ago. This was a group of little citizens owning their own trucks, who went to the steel mills and waited for their loads, hauled them to their destination and waited to unload, but they didn't have any certificates or permits. Steel has a cheap commodity rate on it, but the steel companies were paying enough money that the little truckers could make money if they could get the rate. The problem was the little truckers didn't have permits, so they had to work through these titled Common Carriers and Contract Carriers, and the Common Carriers and Contract Carriers took approximately 32% of the gross revenue. Now about 5% of this went to pay for the insurance, and all the titled Common Carriers and Contract Carriers did for the rest of it, was type out the freight bills. Hence, there was a strike as we read in our newspapers, and in settlement of the strike the little

truckers gained an agreement where the steel mills would pay a certain number of dollars per hour for them and their trucks for waiting to load and unload. To us the ridiculous part of it was, as we read it in the newspapers, that the titled Common and Contract Carriers reached out and even took their per cent of this hourly waiting time, in nearly the same manner as a duke or earl or lord in England would have done. Hence, it brings up this fairly comprised question to the High Court: What constitutes a title of nobility as referred to in Article 1, Section 9, in the Constitution of the United States? This question was brought up in the Interstate Commerce Commission hearing and is in the transcript. It was brought up again in the United States District Court in Kansas City, Missouri, and now we are presenting it to the High Court. We respectfully submit the United States Supreme Court has probable jurisdiction.

Pertaining to question five, we would like to refer the High Court to the Interstate Commerce Commission hearing transcripts, page 157, line 2 through line 13 and other places in the transcripts and also the report and negative order of the Interstate Commerce Commission hearing Examiner. The documents are contained in the District Court's records which have been transmitted to the High Court. Appellants were attempting to show the exact location of trucks in the territory on a given date by such instruments as gasoline tickets, state weight tickets, Port of Entry slips, repair bills, insurance policies, and all types of documents. Several suitcases of these were refused when attempts were made to enter them into the record, but they would have shown the exact location of a truck in a territory on a given date. The law, 49 USC 301 through 327, does not specify the type of evidence that has to be produced at these hearings,

but here is what the law does say in 49 USC 309 (b), and we quote: ". . . and if such carrier was registered on July 1, 1935, under any code of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit." Unquote, and 49 USC 306 (a), (1) and we quote: ". . . and if such Carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate." Unquote. There is nothing in this law that states what evidence shall be or shall not be. If this were a capital crime, being tried in a federal court, we believe several suitcases full of a man's gas tickets, state weight tickets, bill of ladings, truck insurance policies, special permits, etc., would have been used as evidence to prove the man was there, and we believe the courts have convicted accused felons with a lot less evidence as to placing them on the scene than were offered and refused at the Interstate Commerce Commission hearing.

A question fairly comprised herein is—what does constitute evidence when a trucker is trying to prove trucking operations under 49 USC 306, 49 USC 309, and 49 USC 301-310.

Another question fairly comprised herein is, could Examiner refuse the subpoena? Was his refusal tantamount to suppression of evidence?

Another question fairly comprised herein is after refusing to produce the records in the course of the hearing as requested by the subpoena, and ending the hearing with the Examiner having nothing to offer for the United States of America, and then the District Court ordering the records of the Interstate Commerce Commission produced for the Court, could the Interstate Commerce Com-

mission, at that late date, introduce a show cause order that was supposedly sent to appellants concerning the old original permits, MC 61924 and MC 51121, and use it as a weapon to kill these permits? The interesting part of all this is in the volumes of exhibits, we see that Claude G. Cox filed for this permit February 3, 1936, under a Grandfather Clause that had a cutoff date or deadline of Feruary 12, 1936, and his address was 3508 Brighton, Kansas City, Missouri. Exhibit 18 shows that prior to November 13, 1936, Claude G. Cox contacted his attorney, James T. Blair, Attorney at Law. James T. Blair contacted the Interstate Commerce Commission with his letter of November 16, 1936. In Exhibit 1c, the Interstate Commerce Commission wrote James T. Blair, November 23, 1936. Of course, Claude G. Cox never saw this letter before, but was told verbally that apparently his permits were in fine shape. Now in early 1937, Claude G. Cox moved from 3508 Brighton, Kansas City, Missouri, to 2435 Prospect, Kansas City, Missouri. Now, we find in Exhibit 1D that Claude G. Cox was in contact with the Interstate Commerce Commission to secure his identification tags on October 7, 1937 and November 3, 1937. The address on this correspondence was 2435 Prospect, Kansas City, Missouri. Now, the next document, Exhibit 1E, dated October 29, 1937, is addressed to Charles H. Cox and Claude G. Cox, 2435 Prospect, Kansas City, Missouri. This correspondence shows beyond a doubt that the Interstate Commerce Commission had the correct address of Charles H. Cox and Claude G. Cox, 2435 Prospect, Kansas City, Missouri, on October 29, 1937.

Now we go to Exhibit 1F and the District Supervisor is complaining on February 2 and February 18 of 1938, that he cannot contact Claude G. Cox at 3508 Brighton,

Kansas City, Missouri. Naturally he can't because he has resorted back to an old address.

Now we go to Exhibit 1G and what appears to be a notice of a show-cause order and the instrument has no record of service on it and Exhibit 1H appears to be a dismissal for failure to answer the show cause order. These supposedly were sent, along with 1i to the old previous address of 3508 Brighton and there is nothing in these papers at all that shows any of these instruments as having been sent to the attorney-of-record, James T. Blair. This brings up the question: Can the Interstate Commerce Commission, when evidence shows they have the correct address of a trucker, and the address of his attorney-of-record, ignore all of this and send a notice of show cause order and notice of dismissal to an old, previous address and that service be valid or is that service defective?

This brings to mind another question: If all of these actions are kept secret from the trucker until produced by the order of a Federal Court, is this certificate or permit MC 61924 legally dead or legally alive? The Memorandum and Order of the District Court ruled the permits were legally dead merely because the notice of show cause was sent to an address. However, these appellants would believe that we would have difficulty in proceeding on a case in this District Court in Kansas City, Missouri, if we had served a summons on a man at an address that we knew he had moved away from three years ago.

Basically, the same thing happened to the permit of Charles H. Cox, MC 51121. Charles H. Cox had filed for his permit from 906 South 8th Street, St. Louis, Missouri, and had been in contact with the Interstate Commerce Commission from 2435 Prospect, Kansas City,

Missouri, as is shown in Exhibit 2E, Exhibit 2H, Exhibit 2F, had been in the Commission's office at Kansas City, and had filed various contracts and documents over those years including Wilson & Company, Cudahy Packing Inc., etc., and was actually known to the Interstate Commerce Commission men in the Kansas City office.

Now we come to Exhibit 2L as late as April 3, 1938, and the Interstate Commerce Commission claims to have sent a show cause order and later a notice of dismissal to an old address in St. Louis, 908 South 8th Street. The question here again is: If you have a man's correct address, and you revert back to an old former address, through a mistake or on purpose, and serve on him a legal instrument, is that service valid?

Another question fairly comprised herein is: This show-cause hearing was held in Washington, D. C., we find by reading these documents. Was Article 6 of the Amendments to the Constitution of the United States violated? It states and we quote:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district, wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him."

Another question fairly comprised herein is, should the show cause hearing have been held in Washington, D. C., or should the show cause hearing have been held in Kansas City, Jackson County, Missouri, where these appellants lived? The cancelling of these applications in this manner rendered these appellants liable to criminal action, and subject to 49 USC 322 although criminal action was not instituted at the time of the dismissal, the

case of *Ex Parte Young*, 209 US 123, holds that a man need not risk severe criminal penalties to assert his constitutional claims.

Conclusion.

We respectfully submit the High Court has probable jurisdiction.

Respectfully submitted,

CHARLES H. COX
CLAUDE G. COX
J. L. COX
~~Attorneys for~~ *Plaintiffs-Appellants*

APPENDIX

page

Memorandum and Order of the
United States District Court 1a

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 14143-1

CHARLES H. COX, J. L. COX, CLAUDE G. COX, and JAMES H. COX,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Defendants.

Before: Floyd R. Gibson, Circuit Judge, William H. Becker, Chief District Judge, and John W. Oliver, District Judge.

Memorandum and Order.

This case pends on the Government's motion for summary judgment. Jurisdiction in this three-judge court is invoked pursuant to the provisions of Sections 2284 and 2321, et seq., of Title 28, United States Code.

Plaintiffs, appearing *pro se*, seek review of various orders of the Interstate Commerce Commission in several proceedings in which one or more of these plaintiffs filed applications for motor carrier authority. Certified

copies of all documents and records of the Commission pertaining to these plaintiffs have been filed with the Court, and the parties have stipulated that the Court decide this case on the basis of this stipulated record of the Commission's proceedings.

These plaintiffs have been in legal battle with the Commission over a period of thirty years. It is apparent from reading the record of the Commission's proceedings that most of plaintiffs' troubles stem directly from the fact that they refuse to employ counsel to advise and represent them. As we shall discuss below, it is apparent that plaintiffs have never understood what their obligations under the Interstate Commerce Act were. We have, therefore, attempted to read plaintiffs' pleadings liberally and to review the records of the Commission in that light.

This Court's jurisdiction to review decisions of the Interstate Commerce Commission is limited. The scope of review was correctly stated by the Court in *Studna* v. *United States,* W. D. Mo. 1964, 225 F. Supp. 973 at 981-982: "A three-judge court may not review the evidence *de novo* but must sustain the findings and conclusions of the Commissioner where they are found to be supported by substantial evidence. Unless specific and prejudicial departure from the requirements of the law or abuse of discretion is shown, a reviewing court is without authority to intervene. . . ." The scope of review was discussed in *United Van Lines, Inc.* v. *United States,* E. D. Mo. 1967, 266 F. Supp. 586:

> These arguments go to the issue of whether or not the findings of the ICC are supported by adequate and substantial evidence in the record. "The Commission's findings and order is presumptively valid * * *," *Chicago, Rock Island and Pacific R. R.* v. *United States,* 233 F. Supp. 381 (E. D. Mo. 1964),

at 388, and "(t)he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body," *Miss. Valley Barge Lines Co.* v. *United States,* 292 U. S. 282, 286, 287, 54 S. Ct. 692, 78 L. Ed. 1260, quoted with approval in *Sloan's Moving & Storage Co.* v. *United States,* 208 F. Supp. 567 (E. D. Mo. 1962), aff'd. 374 U. S. 95, 83 S. Ct. 1687, 10 L. Ed. 2d 1026 (1963). Therefore, if the conclusions of the ICC are supported by substantial evidence in the record, this Court must affirm the decisions made by the ICC and enforce their orders; "(o)rders of the Commission based upon adequate findings and supported by substantial evidence cannot be upset," *Sloan's Moving & Storage Co.* v. *United States, supra; United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 535, 536, 66 S. Ct. 687, 90 L. Ed. 821 (1946); *Convoy Co.* v. *United States,* 200 F. Supp. 10, 12-13 (D. C. Or. 1961). [266 F. Supp. 588-589]

The applications before this Court sought to establish rights under the 1935 grandfather clause contained in Section 206 (a)(1) of the Motor Carriers Act, 49 USC § 306 (a)(1). That section requires that upon a showing of bona fide operation as a common carrier by motor vehicle as of June 1, 1935, over route or routes or within territories for which application is made and continued operation since that time to the time of the application, an applicant would be entitled to a certificate without proof of public convenience and necessity. The applicant carries the burden of establishing bona fide operation on the statutory date and continuing to the time of the hearing. *Alton Railroad Co.* v. *United States,* 315 U. S. 15 (1942). The test of bona fide operation contemplates an actual rather than potential or simulated service and that such actual service must be substantial. *United States* v. *Carolina Freight Carrier Corp.,* 315 U. S. 475

at 480 (1942). In making its determination on the factual question presented it is the duty of the Commission to consider the characteristics of the transportation service involved and the geographical area served. *Alton, supra; Carolina Carriers, supra; Wintergarden* v. *United States,* E. D. Tenn. 1962, 211 F. Supp. 280.

The 1936 Applications.

In 1936 there were three applications filed, only two of which are before this Court. MC-61924 was filed by Claude G. Cox on February 3, 1936, and MC-51121 was filed by Charles Cox and Jack Sellick on February 12, 1936. The third proceeding, MC 89397, was filed by C. H. Cox and C. G. Cox and involved an application for contract carrier permit. The denial of a permit in connection with MC-89397 on March 18, 1939, is not before this Court.

In both MC-61924 and MC-51121, the Interstate Commerce Commission issued orders to show cause on March 21, 1938, and April 23, 1938, respectively, why the applications should not be dismissed for want of prosecution, there having been an apparent failure to comply with requests to furnish evidence necessary for determination of these applications. No response having been made to those show cause orders, the Commission dismissed MC-61924 on June 9, 1938, and MC-51121 on July 9, 1938, for want of prosecution.

We cannot say that the action of the Commission was either unsupported by the record or arbitrary or capricious. Compare *Peninsula Corp.* v. *United States,* (D. C. 1945) 60 F. Supp. 174.

Plaintiffs attempt in this Court to raise a question concerning the notice that preceded the orders to show

cause and subseqnent dismissal of their 1938 applications. The records of the Commission establish that notice was in fact sent to the plaintiffs at the address shown by the records of the Commission. No evidence was presented which would tend to support any failure to receive the notices or any other irregularity on the part of the Commission.

The 1958 Applications.

In 1958 there were five proceedings before the Commission involving these plaintiffs:

(1) MC-118267, filed by Charles H. Cox on February 10, 1958;

(2) MC-118268, filed by D. E. Cox on December 10, 1958;

(3) MC-118669, filed by J. L. Cox on December 10, 1958;

(4) MC-118670, filed by James H. Cox on December 10, 1958; (The latter party has withdrawn from litigation in this Court); and

(5) MC-61924, (Sub. No. 1), filed by Claude G. Cox, on December 10, 1958.

The applications filed in 1958 sought to establish "grandfather" rights under § 7 of the Motor Carriers Act of 1958, following 49 U.S.C. § 303 (b).

In Case No. MC-118267, application of Charles H. Cox, a hearing to receive grandfather clause evidence under the 1958 Act was held before Examiner Lacy W. Hinely on October 2, 1959, at Kansas City, Missouri. Charles H. Cox appeared for himself. Several protestants appeared by counsel.

Charles Cox attempted to establish his right by the introduction of an insurance policy and a bundle of gasoline and weight receipts. The insurance policy afforded

coverage only for the period of May, 1951, to May, 1952 (Tr. 24). The gasoline receipts were dated 1953 and 1954 (Tr. 42). The record does not indicate that the weight receipts bore any dates at all (Tr. 94).

It is apparent that Charles Cox' efforts to introduce these documents in evidence was frustrated by protestants' constant objections to their relevance and materiality, and by the general confusion created by his apparent inability to understand the nature and extent of his duty with regard to establishing his right to a grandfather's certificate. The transcript of the proceedings before the Commission show that it was indeed difficult for the Hearing Examiner to establish any orderly procedure in the conduct of the proceedings. Charles Cox had brought to the hearing five suitcases full of business documents but he had not made any attempt to organize these documents for presentation in evidence (Tr. 24).

The hearing examiner attempted to aid Charles Cox in the organization of his material and in presentation of his case. He attempted to determine whether Charles Cox had made any abstract or list of shipments transported in 1956, 1957, 1958, and 1959. The answers were all negative (Tr. 46-47). At a later point in the hearing, the examiner was forced to restrict Mr. Cox' evidentiary offers of gasoline slips for the years 1957 to the time of the hearing, absent some showing that applicant had additional documents to indicate transportation for hire of the commodities involved that could be said to be related to the gasoline receipts (Tr. 88). At another point protestants sought to invoke Commission Rule 1.83, which permits a hearing examiner to refuse to receive in evidence other than a number of typical documents and to require the party to abstract the relevant data there-

from (Tr. 55). That motion was overruled, the Hearing Examiner stating that "the rule will be enforced by the Hearing Examiner to the end of giving a fair hearing to everyone and to do it as expeditiously as possible" (Tr. 57).

Late in the day Charles Cox became ill and requested a continuance (Tr. 112). Protestants moved that any further proceedings be consolidated with the similar applications of the other Cox brothers and that certain orders be issued governing procedure of further proceedings (Tr. 115 to 118). The Examiner made clear that he would only continue the hearing and that all motions must be directed to the Commission itself (Tr. 119). The Hearing Examiner also requested that "the applicant do all that is possible to consolidate whatever documents he might have that he desires to present to show transportation or meet the requirements of the Act. . . ." (Tr. 113).

The hearing of Charles Cox was not taken up again until December 8, 1960, at which time it was consolidated with the applications of J. L. Cox, MC-118669; D. E. Cox, MC-118268; Claude G. Cox, MC-61924 (Sub. No. 1); and James H. Cox, MC-118670. The December 8, 1960, hearing was held before another hearing examiner. The morning of the hearing was consumed by the taking of appearances. During that morning various objections were made by the Cox brothers to the appearance of certain protestants and the assertion of the violation of the Cox' alleged constitutional rights. At Tr. 157 the hearing examiner, intent on avoiding the apparent procedural chaos that prevailed in the hearing of October 2, 1959, explained what was necessary for the Coxes to establish their rights. He stated: "When one files for grandfather authority he does not have to prove that there is need for service; he does not have to prove that public convenience and

necessity requires such service; he merely has to show that what his operations have been prior and subsequent to May 1, 1958, and continuous since. The protestants' positions in a grandfather application such as yours are is no more than to see that your operations were actually as you say they were . . . . If you show your operations, you will get your authority; if you don't show your operations, you don't get your authority, it is just that simple. . . . You are not defendants in this case, sir, regardless of the fact that you put it down on your appearance sheet, and that goes to all the Coxes here."

The basis of the Coxes' constitutional objections were that titles of nobility were established and were being exercised by protestants (Tr. 159-160). From Tr. 164 to 178, J. L. Cox was allowed to read a prepared statement into the record dealing with those constitutional ojections. After the noon recess, Charles Cox was allowed to proceed. He sought to serve the Hearing Examiner with a subpoena for all documents pertaining to the various applications of the Cox brothers in the possession of the Interstate Commerce Commission and the complete record of operating authority of Watson Transportation Company and all other parties that made an appearance in these proceedings. The request for the subpoena was denied (Tr. 202).

Charles H. Cox then requested a jury trial (Tr. 203). This was denied. Charles Cox attempted to place J. L. Cox on the stand to testify (Tr. 203). This, too, was denied on the basis that J. L. Cox stated that he was not a witness for Charles H. Cox (Tr. 211). At Tr. 205 the Examiner inquired of Charles H. Cox whether he had made an abstract of the documents that he sought to present for consideration as he had been requested to do by Mr. Hinely in 1959. Mr. Cox stated at Tr. 206 that

in his opinion he was organized. Charles Cox attempted to place into the record a receipt for payment on Permit No. 184625, allowing him to operate on a single trip into and across the State of Nebraska. Objection to this was sustained on the ground that no foundation had been laid (Tr. 214).

At Tr. 218 the Examiner inquired whether Charles Cox had ". . . any documentary evidence of your operations that would begin prior to May 1, 1958, but not prior to January 1, 1957." Charles Cox answered in the affirmative. Thereafter, the Examiner attempted to ascertain the location of those documents. Such documents were never located (Tr. 221).

Charles H. Cox then sought a continuance which was granted until 9:30 the next morning (Tr. 230 and 231).

J. L. Cox took the stand the next morning (Tr. 232) and sought to introduce a certificate of registry of person transporting for hire dated November 14, 1951 (Tr. 234). He also offered a check to the government for transportation tax dated January, 1953 (Tr. 236). The Examiner refused to receive the check in evidence (Tr. 237) and asked the witness to proceed from January 1, 1957. J. L. Cox stated that he did not have documents for 1957 and none later than 1953 (Tr. 239, 242). The case of D. E. Cox, MC-118268, was then called (Tr. 245). He failed to appear.

The Examiner then proceeded to the application of James H. Cox, MC-118670 (Tr. 245). James H. Cox stated that he was born in 1885, with all the rights that were being asked for and demanded that "you people . . . get off my back and give me a certificate so that I can go ahead and work honestly . . . ." The Examiner inquired as to whether the applicant had any supporting

documents and the witness stated that he not going to produce them (Tr. 246).

The hearing was adjourned until 9:30 o'clock the next morning to hear the application of Claude Cox.

On the morning of December 9, 1960, Claude Cox appeared and stated in response to the inquiry of the Examiner that he did not have documents to show operations on and subsequent to May 1, 1958 (Tr. 259). The Examiner inquired whether it was Claude Cox's position that he had been transporting the commodity named in his application from January 1, 1957, until the present time. Claude Cox answered that he did in 1957, but not in 1958, explaining that in 1958 he could not get the stuff. "You couldn't show no authority" (Tr. 260). In response to inquiry about the years 1959 and 1960, Charles Cox stated that "they was afraid that if it was shipped by me they would get themselves in trouble and I would get in trouble."

Claude Cox stated in substance that while he had once shipped the commodities listed in his application that he had discontinued operations in 1957.

The Charles H. Cox hearing was then resumed. He proceeded by adopting the constitutional objections read into the record by J. L. Cox on the previous day. He then stated: "I am physically unable to meet the requirements as set forth by the Court. . . . I have no further statements to make" (Tr. 262). Charles H. Cox stated that he was going to let his application ". . . rest on the record as it is" (Tr. 263). The Examiner then inquired as to whether any of the applicants had anything further, other than adopting certain objections made by the other applicants. They did not (Tr. 263-264). The protestants offered nothing for the record (Tr. 264). The hearings were thus concluded.

On January 5, 1961, Examiner Laughlin recommended dismissal of the application of D. E. Cox, MC-118268. The Examiner stated that the applicant had been called, but had not appeared, that the application did not of itself contain sufficient information to determine bona fide operations, and that the applicant had failed to show any operations performed at a statutory date. A notice signed by Secretary Harold D. McCoy, dated February 6, 1961, from the Interstate Commerce Commission notified the parties that no exceptions having been taken from the recommended order and report with regard to D. E. Cox filed by the Examiner on January 5, 1961, and the period therefore having expired, it became the order of the Commission.

With regard to the applications of Charles H. Cox, J. L. Cox, Claude G. Cox and James H. Cox, exceptions were filed by the applicants on April 10, 1961. Answers were filed by the protestants and applicants' replies on May 9, 1961. On June 27, 1961, the Commission, through Division One, entered its decision and order wherein it adopted the statement of facts, conclusions and findings of the Examiner, it appearing that the exceptions and replies of applicants raised no new or material matters of fact or law. The Commission did not discuss the evidence in light of the exceptions and the replies.

The report of the Examiner adopted by Division One of the Interstate Commerce Commission stated the facts and concluded as follows that "no abstracts or other information were filed by the applicants to show point to point operations."

The Examiner stated in regard to the application of James H. Cox, MC-118670, that no evidence was adduced at the hearing and no documents were presented to sub-

stantiate that he was in bona fide operations during the statutory period.

In regard to the application of Claude G. Cox, MC-61924 (Sub. No. 1), the Examiner stated that, while the applicant claimed he was operating with respect to particular commodities, his operation had ceased in 1957 due to the fact that no one would ship with him absent authority from the Commission. The Examiner further stated that the fact that Claude Cox was unable to obtain shipments was not significant in that it was in the applicant's power to compete for traffic which was moving by other carriers who were in a similar position of holding no authority from the Commission.

In regard to the application of J. L. Cox, MC-118669, the Examiner stated that no documents were offered to show bona fide operations subsequent to 1953, and that, while the applicant claimed he was operating he had stated that he could not get a load. The Examiner stated that the claim of continuous operation on or after May 1, 1958, was not substantiated by any mention of origin or destination and that in any case he would "not be justified in attempting to base a grant of 'grandfather' authority solely on this applicant's uncorroborated testimony of vague and self-serving statements. This is not to cast any doubt about applicant's veracity but only to make it clear that in proceedings of this nature confirmatory evidence is required." The Examiner then stated that in light of this information no finding of bona fide operations could be made.

In regard to the application of Charles H. Cox, MC-118267, the Examiner stated that "substantially no documents were produced to show commodities being shipped, the weights thereof, the consignor or consignee, or the origin and destination. The Examiner further stated that

Charles Cox subsequently admitted that he had no documents to support his application. The Examiner stated that the gasoline and weight slips presented by Charles Cox, dated 1953 and 1954, had no determinative value because they were too remote from the statutory date. The Examiner then stated that Charles Cox had failed to show bona fide operations during the statutory period.

The findings of the Hearing Examiner, as adopted by the Commission, are supported by substantial evidence. We so find.

The record of the Commission was truly devoid of any competent evidence to substantiate plaintiffs' bare claims of bona fide operations. The apparent root cause of this void is plaintiffs' complete lack of understanding of the law and legal processes, though it is impossible to say whether there was in fact any merit to plaintiffs' cause within the statute. Further, it must be stated that under the circumstances the Hearing Examiners attempted in every possible way to assist the plaintiffs in the presentation of their cases.

The contention of the plaintiffs that they could not obtain business because they did not have Commission authority and therefore no one would do business with them raises the question of whether an interruption in service was beyond plaintiffs' control.

It further implies that applicant attempted to obtain loads and was thus holding out his services to the public. Whether the applicant was engaged in bona fide operations continuously since the grandfather date, assuming he was operating on that date except for interruptions in service beyond his control, is a question of fact to be determined by the Commission. *United States* v. *Maher*, 307 U. S. 148 (1939). See also *Melman* v. *United States*, S. D. Iowa 1964, 231 F. Supp. 503, and *Mid-States Freight*

Lines v. *United States* (D. Kan. 1944), 56 F. Supp. 20.

The Hearing Examiner found with respect to Charles H. Cox that the gasoline sales slips and weight station slips showing dates of 1953 and 1954 had no probative value; that said documents failed to show the movement of any of the involved commodities; and that while applicant was requested to obtain documents to show operations from 1957 to date, said request was not complied with. We cannot say that the Examiner's ruling here with regard to the 1953 and 1954 documents was arbitrary. In *Wintergarden, supra,* the court held that once bona fide operations were established as of the statutory date, the evidence of holding out becomes significant for the purposes of determining exactly what the scope of those bona fide operations were. The Examiners held here that the applicants had failed to establish bona fide operations as of the statutory date.

Free of all the chaff created by the plaintiffs' lack of legal assistance, this case simply comes down to plaintiffs' inability to establish what it was clearly their statutory duty to establish after having been given full and fair opportunity to do so before the Commission.

For the above stated reasons, it is

ORDERED that defendants' motion for summary judgment be, and is hereby, granted and the decision of the Interstate Commerce Commission regarding these plaintiffs be, and are hereby, affirmed.

FLOYD R. GIBSON, *Circuit Judge,*
WILLIAM H. BECKER, *Chief Judge,*
JOHN W. OLIVER, *District Judge.*

Kansas City, Missouri,
July 15, 1968.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

CHARLES H. COX, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission jointly move that the judgment of the district court be affirmed.

STATEMENT

This is an appeal from the unanimous decision of a three-judge district court (J.S. App. 1a-14a) sustaining certain orders of the Interstate Commerce Commission which denied appellants' applications for mo-

tor common carrier certificates under the Interstate Commerce Act.[1]

Appellants are three individuals who have unsuccessfully attempted, for more than 30 years, to obtain authority to operate as common carriers by motor vehicle. In February 1936, they filed two applications seeking such authority under the "grandfather" clause of Section 206(a)(1) of the Motor Carrier Act of 1935,[2] which authorizes certification, without proof of public convenience and necessity, for *bona fide* operations that had been conducted prior to June 1, 1935. The applicants failed, however, to respond to the Commission's request to submit the requisite evidence of prior *bona fide* operations, and in 1938 the applications were dismissed for want of prosecution (J.S. App. 4a).[3]

After passage of the Transportation Act of 1958, appellants sought "grandfather" authority under Section 7(c) of that Act[4] to transport, between all points in the United States, certain previously exempt commodities which the Act brought within the Commis-

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[1] The opinion of the district court is not yet reported.

[2] 49 U.S.C. 306(a)(1).

[3] A third application dating from that period sought a contract-carrier permit to transport certain named commodities pursuant to Section 209(b) of the Act (49 U.S.C. 309(b)). After a full hearing, the Commission denied the application on the ground that the proposed operations would not be in the public interest (Cox Contract Carrier Application, 14 M.C.C. 777). Appellants took no appeal from that decision and do not challenge it here.

[4] 72 Stat. 573, 49 U.S.C. following 303(b)(6).

sion's regulatory authority. Their five applications [5] were consolidated, and hearings were conducted in Kansas City, Missouri, in October 1959 and December 1960. Appellants appeared without counsel, and protesting motor and rail carriers appeared in opposition.

At the first of these hearings, appellants' only evidence consisted of an insurance policy and five suitcases containing gasoline and weight receipts that were either undated or bore dates between 1953 and 1954 and contained no information as to the origin, destination, or nature of the transported commodities. According to Commission Rule 1.83 (49 C.F.R. (1963 rev.) 1.83), appellants were allowed to read into the record, ten representative documents.[6] Appellants did not, however, comply with the examiner's request that an abstract of this evidence be prepared and presented at the next hearing, held over a year later. No further evidence was offered, and the Commission, adopting the findings and conclusions of the hearing examiner, held that appellants had failed to prove *bona fide* operations bracketing the critical date, May 1, 1958, and accordingly denied the applications in an order dated July 3, 1961.

Appellants then commenced this proceeding for review of the Commission's 1938 and 1961 orders. Although a district judge advised them to obtain legal counsel, they insisted on proceeding *pro se* (see J.S.

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[5] Docket Nos. MC-118267 (Charles H. Cox); MC-118268 (D.E. Cox); MC-118669 (J. L. Cox); MC-118670 (James H. Cox); and MC-61924 (Sub-No. 1) (Claude G. Cox).

[6] The one commodity specified on any of the ten slips was grapefruit, a commodity not covered by Section 7(c).

13; J.S. App. 2a). The three-judge district court, reading appellants' pleadings liberally and reviewing the record carefully in the light of their *pro se* status (J.S. App. 2a), unanimously granted the government's motion for summary judgment and dismissed the action (J.S. App. 1a-14a).

ARGUMENT

1. The standards applicable to appellants' applications for grandfather rights are well settled (see, *e.g.*, *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475; *Willis Shaw Frozen Food Express, Inc.* v. *United States*, 377 U.S. 159), and appellants raise no question as to the correctness of their application by the Commission. The Commission determined that appellants had failed to establish that they were engaged in substantial operations on the "grandfather" dates[7] and, therefore, were not entitled to motor carrier certificates without proof that the public convenience and necessity required their operations. After extensive review, the court below properly determined that this

[7] With respect to the 1958 applications, appellants Claude G. Cox and J. L. Cox conceded that neither had engaged in transportation of the involved commodities on May 1, 1958, the "grandfather" date, or thereafter. Operations terminated prior to this date are insufficient to establish claims to "grandfather" rights (*Gregg Cartage Co.* v. *United States*, 316 U.S. 74; *United States* v. *Maher*, 307 U.S. 148, 154-155); inability to obtain customers, which these appellants advanced, is not considered to be an excusable "interruption of service over which [an] applicant had no control" (*Gregg Cartage Co.* v. *United States*, *supra*, 316 U.S. at 80-83; *Melman* v. *United States*, 231 F. Supp. 503, 506 (S.D. Iowa)).

finding was adequately supported by the record.[8] *Colonial Refrigerated Transportation, Inc.* v. *United States*, 255 F. Supp. 999, affirmed, 386 U.S. 480; *Exley Express, Inc.* v. *United States*, 385 U.S. 371; *Battaglia* v. *United States*, 385 U.S. 115; *Lester C. Newton Trucking Co.* v. *United States*, 264 F. Supp. 869 (D. Del.), affirmed, 389 U.S. 30.

2. Appellants' various challenges to the regulatory scheme governing the motor carrier industry are insubstantial. They claim that the Seventh Amendment guaranteed them a jury trial in the proceedings to determine "grandfather" rights. But that Amendment applies to actions "at common law" and here Congress permissibly chose an administrative forum for the determination of such rights.[9] See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49.

Appellants next contend that the "grandfather" statutes are unconstitutional *ex post facto* laws. The thrust of their claim is that a right to continue motor carrier operations vests in perpetuity if any operations were conducted prior to commencement of public regulation of that industry. But by recognition of "grandfather" rights for such continuing and *bona*

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[8] The district court observed that it was impossible to say whether, with the assistance of legal counsel, appellants might have demonstrated some merit to their claims (J.S. App. 13a). We point out, however, that the refusal to retain counsel was deliberate, and apparently not compelled by poverty (see J.S. 13). In addition, the two hearing examiners repeatedly sought to assist appellants in adducing and presenting any relevant evidence they might have had to support their claims (see J.S. App. 6a-9a).

[9] Motor Carrier Act, § 206(a), 49 U.S.C. 306(a).

fide operations, Congress has made adequate provision for carriers engaged in substantial operations prior to the commencement of administrative regulation. See *Transamerican Freight Lines* v. *United States*, 51 F. Supp. 405, 409-411 (D. Del.); cf. *Stephenson* v. *Binford*, 287 U.S. 251, 264.

Appellants also argue that the burden of proving that they were not in *bona fide* operation on the "grandfather" dates should rest on the Commission, on the theory that appellants were really "defendants". This argument misapprehends the nature of proceedings involving application for agency authority. Moreover, since the facts concerning prior operations are entirely within the hands of the applicant, it would be impossible for the Commission to prove the negative in grandfather cases. Thus the statutory scheme validly places the burden of proving such operations upon the applicant. *Alton R. Co.* v. *United States*, 315 U.S. 15, 25; *United States* v. *Maher*, 307 U.S. 148, 155; *Willis Shaw Frozen Food Express, Inc.* v. *United States, supra.*

Appellants assert that they never received notice of the Commission's 1938 show cause orders or the final orders of dismissal of the two 1936 applications. The Commission's records, however, indicated that appellants were served by registered mail at the most recent address furnished to the Commission by them and that the applicants' authorized agent was served by ordinary mail (J.S. App. 4a-5a).

3. The Commission's orders and the lower court's opinion leave no doubt that the appellants were accorded every opportunity to establish their rights to

"grandfather" authority under the 1935 and 1958 legislation. Indeed, the record manifestly shows that the Commission and the lower court extended every assistance to the appellants in seeking to establish their claims. Those claims have been properly denied and raise no significant legal issues.[10]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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DECEMBER 1968.

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[10] Appellants' miscellaneous contentions—*e.g.*, that Congress lacks power to regulate interstate trucking and that certificates of public convenience and necessity constitute prohibited titles of nobility—do not warrant discussion.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

COX ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

No. 708. Decided January 13, 1969.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.